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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway—Fifth Floor
New York, New York 10003-9518
(212) 254-1111

Attorneys for Petitioners

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This petition arises from the refusal of the district court to order the recusal of the Honorable James M. Ideman, pursuant to 28 U.S.C. § 455(a), in four cases involving various churches of the Scientology religion. The recusal motion was based on several grounds, including that a framed cover of *Time* magazine proclaiming "Scientology: The Cult of Greed," hangs in Judge Ideman's chambers. The *Time* cover story itself consists of a vicious one-sided attack on the Scientology religion, its leadership, and its lawyers. Petition for Writ of Certiorari at 2-7 ("Pet. at __"); Appendix E to Petition; *see also* Pet. at 7-12, 27-30. The district court denied the recusal motions based on an incorrect legal analysis in which it inquired into Judge Ideman's subjective state of mind and his actual bias and prejudice, rather than section 455(a)'s objective inquiry into whether the judge's "impartiality might reasonably be questioned." *See* Pet. at 11-13, 27-30; Pet. App. 5a-17a. The court of appeals denied the petition for mandamus because "the harm alleged in the petition is correctable on appeal" (Pet. App. 3a), and also because the "district court's order . . . was not clearly erroneous" (Pet. App. 2a-3a). Pet. at 13, 24-27.

REASONS FOR GRANTING THE PETITION

I. The government concedes an essential element of petitioners' argument to this Court: that mandamus review of recusal motions pursuant to 28 U.S.C. § 455(a) is appropriate because "[p]ublic confidence in the courts [requires] that such a question be disposed of at the earliest possible opportunity." Brief For the United States in Opposition at 4 ("Gov. Opp. at ___") (internal quotations omitted); Opposition of David Mayo, *et al.*, at 8-11 ("Mayo Opp. at __"); *see* Pet. at 14-24. The government's position is unsurprising because it too has sought mandamus review when

the district court has denied its section 455(a) recusal motion. *See, e.g., In re United States*, 666 F.2d 690 (1st Cir. 1981); Pet. at 16 n.14.

Despite this concession, the government glosses over the fact that the Ninth Circuit is the only circuit which currently holds that a finding that "the harm alleged in the petition is correctable on appeal" (Pet. App. 3a) is sufficient to deny a petition for mandamus of a denial of a section 455(a) motion. Thus, even if *In re Cement Antitrust Litigation (MDL 296)*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of quorum*, 459 U.S. 1191 (1983), could be construed as not *absolutely* prohibiting mandamus review of a denial of a recusal motion, *see* Gov. Opp. at 5 n.1; Mayo Opp. at 10-12; Pet. at 15-16, the fact is that in *this* case the Ninth Circuit stated that the availability of a post-judgment appeal is sufficient to deny a mandamus petition (Pet. App. 3a).

Moreover, both the government and Mayo are disingenuous in their attempts to interpret *Cement Antitrust* as not precluding mandamus review of a denial of a recusal motion in the Ninth Circuit. The decision unambiguously states, "We next consider whether a post-judgment appeal would provide an effective remedy and thus *render the exercise of our mandamus authority inappropriate*." 688 F.2d at 1302 (emphasis added). The court of appeals then stated, "the law is that an order *denying* a motion for disqualification is reviewable on appeal after final judgment." *Id.* (emphasis original).

Respondents' efforts to downplay the court's clear enunciation of its view of the law on the ground that this was not the precise holding of the case is

unavailing. Gov. Pet. at 5 n.1; Mayo Opp. at 11-12.[1/] First, the court's statement that the availability of post-judgment relief renders mandamus review inappropriate in the Ninth Circuit could not be clearer. Second, petitioners seek review of the decision below, *not* the decision in *Cement Antitrust*. In *this* case, the court of appeals understandably construed *Cement Antitrust* as requiring the denial of the mandamus petition because of the availability of post-judgment relief (Pet. App. 3a). Third, respondents do not cite, and petitioners have been unable to find, a single Ninth Circuit case in the ten years since *Cement Antitrust* that even suggests that mandamus review is available from a denial of a section 455 motion.[2/] Finally, the

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[1/] Respondent Mayo's assertion that the court's above-quoted view in *Cement Antitrust* "consists of an observation about the decisions of *other* circuits," Mayo Opp. at 12 (emphasis original), is puzzling. The court in fact relied on decisions of this Court, *Berger* v. *United States*, 255 U.S. 22 (1921), and the Ninth Circuit, *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC*, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961). *See Cement Antitrust*, 688 F.2d at 1302.

[2/] Again, petitioners are puzzled by respondent Mayo's assertion that "a review of applicable Ninth Circuit authorities, decided both before *and after In re Cement* undeniably establishes the general availability of mandamus to review the *denial* of a recusal motion. . . ." Mayo Opp. at 11 (emphasis added and original). In fact, Mayo only cites to three Ninth Circuit decisions, all decided well *before Cement Antitrust*. *See* Mayo Opp. at 13. In *United States* v. *State of Washington*, 573 F.2d 1121 (9th Cir. 1978), (miscited by Mayo as "537 F.2d") the court stated only that mandamus review "may" be available, but only "[i]n the exceptional case," *id.* at 1122, and refused to consider the appeal therein as a mandamus petition. The other two cases (both from the 1950's) involved mandamus petitions under 28 U.S.C. § 144 based upon exceptionally blatant expressed personal bias and prejudice of the judge against the attorney or the parties. And *United States* v. *Conforte*, 457 F.Supp. 641, 651 (1978), *aff'd on unrelated grounds*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980), (continued...)

Ninth Circuit continues to hold that harm caused by a violation of section 455(a) can be corrected on post-judgment appeal, which reinforces that court's view that mandamus relief is inappropriate. *See Preston* v. *United States*, 923 F.2d 731, 735 (9th Cir. 1991). Because respondents have refused to recognize the clear import of *Cement Antitrust*, as reflected in the decision below, they have simply ignored the conflict between the Ninth Circuit and all other circuits that have addressed this issue. *See* Mayo Opp. at 15 n.8 (expressly declining to address the law in other circuits); Gov. Opp. at 6-7.

Respondents also have ignored the utter disarray among the circuits as to the proper procedural and substantive standards to be employed on mandamus petitions from denials of section 455(a) motions. *See* Pet. 14-20. The government is simply wrong when it asserts that the standard of review on mandamus is effectively the same in the various circuits. Gov. Opp. at 7. As petitioners have shown, some circuits, such as the First and Second, apply a much more stringent substantive standard of review on mandamus than on post-judgment appeal. Pet. at 16. Other circuits, such as the Third, Fifth, Sixth, Eight, and Tenth, apply the same substantive standard of review on mandamus and on post-judgment appeal. Pet. at 17-18. Finally, the Seventh Circuit reviews denials of section 455(a) recusal motions *only* by mandamus, under the less demanding standard of review. Pet. at 18-20.

Those circuits that do not impose a heightened standard on mandamus review recognize that when the statutory standard is met, *i.e.*, when the judge's "impar-

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[2]/(...continued)
involved a district court decision, which relied solely on a Fifth Circuit case for the proposition that a refusal to recuse under 28 U.S.C. § 455 could be reviewed by mandamus.

tiality might reasonably be questioned", then the right to relief is clear and indisputable, and the petition for mandamus should be granted. Pet. at 21-24. As petitioners have explained, this approach best effectuates the purposes of section 455(a), best conforms to the proper usages of mandamus, and uses judicial resources most efficiently. Pet. at 20-24. The government's denials notwithstanding, this approach is very different than that of the First or Second Circuits, which impose the added burden that it must be clear and indisputable that the judge's impartiality might reasonably be questioned before a mandamus petition may be granted. Pet. at 21.

II. Even assuming that the Ninth Circuit purportedly engaged in some minimal review of the merits of the mandamus petition, its "clearly erroneous as a matter of law" test, *Cement Antitrust*, 688 F.2d at 1305; *Bauman* v. *United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977); Pet. App. 2a-3a, presents a virtually insurmountable barrier to meaningful mandamus review of a denial of a section 455(a) motion and undermines the purpose of section 455(a), which is to maintain public confidence in the integrity of the judiciary. *See Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988); Pet. at 24-27. As this Court stated, "If [a judge] concludes that 'his impartiality might reasonably be questioned,' then he should also find that the statute has been violated." *Id.* at 861. Nevertheless, the court below stated that even when "reasonable minds might draw different inferences from the facts," a district court order denying recusal will not be overturned unless it is "clearly erroneous" as a matter of law (Pet. App. 2a-3a). As petitioners have explained, the court's finding that "*reasonable minds might* draw different inferences" (emphasis added), effectively parallels the statutory language that recusal is mandated whenever a judge's "impartiality *might reasonably be* questioned," 28 U.S.C.

§ 455(a) (emphasis added), and if there is any relevant distinction between these two standards, it would certainly escape an objective reasonable lay person. Pet. at 24-25.

Indeed, petitioners note that the government does not even mention, let alone attempt to defend, the Ninth Circuit's idiosyncratic "clearly erroneous as a matter of law" standard. The government ignores this issue by incorrectly asserting that "the petition for writ of mandamus raises only questions of fact." Gov. Opp. at 7. In fact, the mandamus petition raised several legal issues, including that the district court improperly applied a subjective, rather than an objective, reasonable person standard; required actual bias, rather than the appearance of partiality; and demanded that evidence of partiality be from an extrajudicial source. *See* Petition for Writ of Mandamus at 40-44; Pet. at 27-30.[3/]

Respondent Mayo's extensive reliance on the five-factor *Bauman-Cement Antitrust* test,[4/] Mayo Opp.

[3/] The government incorrectly asserts that the court of appeals properly reviewed the district court's findings of *fact* for clear error. Gov. Opp. at 7-8 & n.3. The court's plain language and its citation to *Bauman* and *Cement Antitrust*, Pet. App. 3a, however, make clear that it held that the "order denying recusal," Pet. App. 2a, was not "clearly erroneous as a matter of law," not that the district court's fact findings were not clearly erroneous. Pet. at 25-27.

[4/] The factors are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and (5) whether the district court's order raises new and important problems or issues of law of first impression. *Cement Antitrust*, 688 F.2d at 1301; *Bauman*, 577 F.2d at 654-55.

at 9-10, 15-21, only emphasizes the unique obstacles to mandamus review imposed by the Ninth Circuit. The party petitioning from denial of its recusal motion will always fail the first two factors, because the Ninth Circuit holds that the party may remedy any harm by post-judgment appeal. *See Cement Antitrust*, 688 F.2d at 1302; *Preston*, 923 F.2d at 735; Pet. App. 3a; *Branson* v. *City of Los Angeles*, 912 F.2d 334, 336 (9th Cir. 1990) (first factor not met when post-judgment appeal is available). Moreover, the petitioner in a section 455(a) case will almost always fail the fourth factor, because the denial of a recusal motion by a particular judge in a particular case will almost never involve repeated error or persistent disregard for the federal rules. Finally, the fifth factor will rarely be met because, although the factual variations are infinite, the legal principles for recusal under section 455(a) are well-settled (although they were ignored by the district court in this case, Pet. 27-30; Pet. App. 5a-17a).

Thus, the *only* factor a mandamus petitioner might meet in seeking review of a denial of a section 455(a) motion is the "clearly erroneous as a matter of law" factor. Yet if this factor were alone sufficient, it would be a "one-factor" test. Moreover, this standard itself undermines the very purpose of section 455(a). *See* Pet. 24-27. Finally, petitioners note that the Ninth Circuit abandons the *Bauman-Cement Antitrust* factors, including the "clearly erroneous" standard, in areas of the law in which the court believes that mandamus review is generally appropriate. *See Wilmington Trust* v. *United States Dist. Court*, 934 F.2d 1026, 1028 (9th Cir. 1991) (right to jury trial), *cert. denied*, 112 S.Ct. 1578 (1992); *Mondor* v. *United States Dist. Court*, 910 F.2d 585, 586-87 (9th Cir. 1990) (same). Thus, the court of appeals' decision to impose the *Bauman-Cement Antitrust* factors to deny review of the mandamus petition in this case must be seen as a decision,

contrary to that of every other circuit, that substantive mandamus review of a denial of a section 455(a) recusal motion is generally inappropriate.

III. Application of the correct legal standards mandates granting of the petition for writ of mandamus and recusal of Judge Ideman in the four cases at issue herein. Pet. at 27-30. No deference is due the district court's order because it engaged in a subjective inquiry into Judge Ideman's state of mind, rather than an objective inquiry into how a reasonable lay person would have viewed the known facts, as required by section 455(a). *See* Gov. Opp. at 6; Pet. at 27. The government's attempt to remake the district court's findings as to Judge Ideman's subjective bias into an objective "reasonable person" inquiry, Gov. Opp. at 8 n.2, is creative, but must ultimately fail in the face of the court's clear holding: "We are left with the issue, is the objective reason that you've asserted for believing that he has some bias sufficient to support a conclusion that he does. . . . the law is clear, *the bias* must stem from an extrajudicial source . . . . That is the issue to be decided." Pet. App. 12a. That, however, is *not* the issue to be decided. Rather, the issue is whether a reasonable lay observer might question the judge's impartiality. *See* 28 U.S.C. § 455(a). Thus, whether the district court's "factual findings" as to Judge Ideman's subjective state of mind are clearly erroneous, Gov. Opp. at 8 n.3, is irrelevant.[5/] Indeed, respondents Mayo and Aznaran more forthrightly

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[5/] The government's assertion that findings of fact should not be reviewed *de novo*, Gov. Opp. at 8 n.3, is likewise irrelevant to this matter, in which the district court applied the wrong *legal* standard. The Ninth Circuit has recently stated (somewhat inconsistently with the standard it applied in this case and in *Cement Antitrust*) that when the issue is one of law, "We determine *de novo* whether the writ [of mandamus] should issue." *Valenzuela-Gonzalez* v. *United States Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990).

recognize that the district court focused on actual subjective bias, although they are wrong in contending that that was the proper inquiry in this case. *See* Mayo Opp. at 22-24; Brief in Opposition of Vicki J. Aznaran, *et al.*, at 16-24 ("Aznaran Opp.").

Because the district court made irrelevant findings of fact and applied incorrect legal standards, its decision is entitled to no deference, and certainly the convoluted, "elusive at best" "clearly erroneous as a matter of law" standard of *Cement Antitrust*, 688 F.2d at 1305, has no place in this case. Petitioners submit that proper application of section 455(a) to the facts of this case, particularly the presence of the framed, mounted copy of the *Time* magazine cover in Judge Ideman's chambers, would lead a reasonable observer to question Judge Ideman's impartiality, Pet. at 3-11, 27-30, and therefore the petition for writ of mandamus should have been granted.

IV. The Aznaran Opposition is devoted primarily to a lengthy recitation of excuses (generally belied by the evidence) as to why the Aznarans have repeatedly failed to obey Judge Ideman's orders, and to scurrilous invective directed against petitioners and the Scientology religion that is irrelevant to the issues presented herein. Aznaran Opp. at 3-15.[6/] The only relevant fact set forth in the Opposition is the district court's finding that it is "largely undisputed" that "the blatant disregard of [Judge Ideman's] order was not

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[6/] Much of the rest of the Aznaran Opposition focuses erroneously, as did the district court itself, on the standards for actual judicial bias and prejudice, including lengthy excerpts from the district court's decision, rather than on the objective appearance of impropriety standard of section 455(a). Aznaran Opp. at 16-24.

attributable to" the Church. Pet. App. 13a; Aznaran Opp. at 23; Pet. at 11-12, 30.[7/]

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 14, 1992

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway- Fifth Floor
New York, New York 10003
(212) 254-1111
Attorneys for Petitioners

7/ Petitioners further note that the Aznaran Opposition was untimely served and filed on May 5, 1992, despite this Court's order that all briefs in opposition be filed no later than May 4, 1992 (the Court's order provided for filing by May 3, 1992, which was a Sunday). The Aznarans made no application to this Court for a further extension or for permission for late filing. Therefore, the Aznarans' brief should not be accepted for filing or considered by the Court. Petitioners further note that the late filing provides yet another example of the Aznarans' "blatant disregard" of court orders, as found by the district court. Pet. App. 13a.